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### **Working Party No. 3 on Co-operation and Enforcement**

#### **GEOGRAPHIC MARKET DEFINITION**

-- Note by Sweden --

**28-29 November 2016**

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-- SWEDEN --

**1. Introduction**

1. In this contribution, the Swedish Competition Authority (SCA) focuses on the impact of online retail on the definition of geographic markets. This note will refer to some of the SCA's antitrust and merger cases where the growth of digitalisation and internet-based retailers has, to a varying extent, been part of the analysis.

2. The growth of e-commerce has increased the number of alternative suppliers that are available to consumers, who are no longer limited to the retailers that have physical presence within a certain distance from where they live or work. Hence, e-commerce has the potential of widening the relevant geographic markets in competition law cases. From a competition perspective this development is of course very welcome as it means that consumers have more choice and more suppliers compete in the market.

3. However, as the cases outlined below show, the emergence of e-commerce has not always, or at least not yet, resulted in wider geographic markets than would have been the case in an "off-line world".

4. It should be noted that the e-commerce sector continues to develop, and that the definition of relevant markets and the competitive assessment in future cases may differ from past cases. In particular, several initiatives from the European Commission to create a digital single market can make cross-border e-commerce easier and more affordable.<sup>1</sup> More cross-border trade may justify a wider geographic market, or alternatively be taken into account in the competitive assessment as constraints from outside the geographic market.

**2. Some general observations on the SCA's definition of geographic markets**

5. In competition law cases the SCA defines the – from an economic point of view – "real" geographic market, which is not limited to the territory of Sweden. In other words, the relevant geographic market could be either wider than national, national or narrower in scope. This is also the case when the subsequent competitive assessment is limited to the effects in the territory of Sweden, e.g. in a merger case. Two examples where the geographic market expanded across the border are summarised below (an antitrust case concerning stock trading and a bus tour operator cartel).

6. The Swedish national competition rules, including rules for merger control, have been modelled after the EU competition rules. Consequently, the SCA frequently refers to the European Commission's notice on the definition of relevant market<sup>2</sup> when applying articles 101 and 102 TFEU as well as the equivalent provisions in the national competition act and in merger cases. The SCA has not issued any guidelines on market definition of its own.

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<sup>1</sup> See e.g. the European Commission's press release of 6 May 2015, "A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen", IP/15/4919.

<sup>2</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 09.12.1997.

7. The precise definition of the relevant market, including the relevant geographic market, is less crucial in cartel cases as this is not necessary in order to find an infringement (see e.g. the cartel cases concerning car sales and package bus tours discussed below). However, the geographic market is still relevant in such cases as the undertaking's sales in the relevant market is the basis for the SCA's calculation of the fines.<sup>3</sup>

### 3. Cases

#### 3.1 Computer components

8. Computer components (graphics cards, hard disk drives, memory modules etc.) are products with standardised interfaces and a high degree of interchangeability. Some of these products are traded almost as commodities on a global market with daily price changes. However, at the retail level, the geographic scope of the relevant market could be narrower. Indeed, in a case<sup>4</sup> concerning the merger between two retailers of computer components, the SCA found the relevant geographic market to be national in scope.

9. The merging retailers offered computer components to consumers who prefer to assemble their own PCs, or who want to upgrade their existing PCs with new components. The SCA found that the relevant product market included both sales through brick-and-mortar shops and online sales. Considering that the same components are used in computers globally, one may have expected that the (presumably "tech savvy") customers would see online retailers from the whole world, who offer identical products, as alternative suppliers.

10. But it turned out that Swedish consumers had a strong preference for Swedish retailers. Sales data showed that cross border trade at the retail level was limited. A customer survey conducted by the SCA showed that the main reasons for the preference for national retailers was faster delivery, lower shipping costs and uncertainty over consumer protection when buying from non-Swedish retailers.<sup>5</sup> In particular, customers voiced concerns over having to return defective products and get a refund or a replacement, which was seen as more complicated and uncertain with retailers from other countries compared to domestic retailers. This hesitation may of course diminish over time, following initiatives from the European Commission to enforce consumer rules more rapidly and consistently within the EU,<sup>6</sup> and as consumers become more experienced and gain confidence in purchasing from foreign retailers.

#### 3.2 Trading in stocks

11. Trading on stock exchanges is today done through electronic trading, which has replaced the traditional floor trading. In a way, this is an extreme example of e-commerce, since most trading in listed companies is done "online".<sup>7</sup> Together with the deregulation of stock exchange trading in Europe,<sup>8</sup> this has changed both how and where trading can take place.

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<sup>3</sup> See the SCA's Method of setting administrative fines, File ref. 394/2009.

<sup>4</sup> The SCA's decision of 2 August 2013 in case 270/2013 – *Komplett/Webhallen*.

<sup>5</sup> Similar concerns have been identified by the European Commission in its Preliminary report on the E-commerce Sector Inquiry, SWD(2016) 312 final, 15 September 2016.

<sup>6</sup> See footnote 1

<sup>7</sup> Very large trades may still be executed manually outside the stock exchange as they could otherwise have an adverse impact on market prices.

12. In a case against the incumbent stock exchange operator Nasdaq OMX, the SCA investigated the markets for trading in Swedish, Danish and Finnish stocks. According to the SCA, Nasdaq OMX abused its dominant position when it prevented a competing trading platform from using a vital third-party data centre, thereby weakening this new entrant's competitive position. The case is pending in the Patent and Market Court.<sup>9</sup>

13. Nasdaq OMX offers trading services to its members, i.e. to banks, brokers and other trading firms that want to trade stocks in their own account or on behalf of investors. In the case, the SCA has defined the relevant product markets as services for trading in Swedish, Danish and Finnish stocks, respectively.<sup>10</sup>

14. Trading venues that want to offer trading in Swedish, Danish and Finnish stocks could, from a regulatory point of view, be located anywhere in the EEA where the same regulatory framework is in force. As trading is done electronically, a trading venue could place its computer, or "matching engine"<sup>11</sup>, in any data centre that is connected to electronic communications networks used for financial services, and be able to offer its services to banks and brokers. However, due to the importance of speed in today's trading markets, it is a significant disadvantage for a trading venue to have its matching engine located far away from its customers' computers.<sup>12</sup> For some trading strategies, even the milliseconds it takes for a computer signal to travel a few kilometres can make a difference. Most banks and brokers who traded in Swedish, Danish and Finnish stocks were located in Sweden and the United Kingdom. Consequently, the vast majority of trading in these stocks took place in Sweden (Stockholm) and the United Kingdom (London), and only to a limited extent on other trading venues.<sup>13</sup>

15. The results of the SCA investigation showed that most of the buy and sell orders that originated from Stockholm were also executed on trading venues in Stockholm. However, not all trading strategies are sensitive to time delays, and some of the orders originating from Stockholm were sent to trading venues located in London or elsewhere. There was also a flow of orders from London to Stockholm. This indicated that trading in Stockholm to some extent could be substituted with trading in London and other locations where trading in Swedish, Danish and Finnish stock took place. The replies to the SCA's survey to Nasdaq OMX's members also indicated that trading venues in London were on the same geographic market as trading venues in Stockholm.

16. Due to differences in the regulatory frameworks and different time zones, the SCA excluded other parts of the world in the relevant geographic market. For the purpose of the case, the SCA defined the relevant geographic market as the European Economic Area (EEA).

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<sup>8</sup> The Markets in Financial Instruments Directive (Directive 2004/39/EC) (MiFID), in force since November 2007, governs the operation of traditional stock exchanges and alternative trading venues, and introduced competition in trading of financial instruments.

<sup>9</sup> Patent and Market Court, case T 7000-15 – *Konkurrensverket v Nasdaq OMX*

<sup>10</sup> The three relevant product markets include trading services offered by two types of trading venues: Regulated markets ("stock exchanges") and multilateral trading facilities (MTF). Moreover, the product markets only include trading in so called transparent order books, excluding trading in so called dark pools and outside trading venues.

<sup>11</sup> A matching engine is the trading venue's computer that matches all buy and sell orders.

<sup>12</sup> The trading firms' computers are often referred to as "trading engines". They are connected to the trading venue's matching engine to which they send orders and from which they receive market data.

<sup>13</sup> During the time period of the alleged infringement, trading in the relevant stocks also took place on e.g. Deutsche Börse and Borsa Italiana.

### 3.3 Cars

17. In a case concerning a cartel among Volvo car dealers in the southern part of Sweden, several dealers had colluded on prices for new and used cars.

18. The SCA found the relevant geographic market to be Sweden's three most southerly counties (*Skåne, Blekinge* and *Kronobergs län*), for the sale of both new and used cars. Sales data showed that a majority of the dealers' sales of new cars was within each dealer's territory that was assigned under a selective distribution system. A large majority of their sales was within the three southern counties. The same applied to the sales of used cars, although a slightly higher share of the used cars was sold outside each dealer's territory. Of the sales to the rest of Sweden, a large share was sold to Stockholm. This could to a large extent be explained by the purchase of company cars by firms registered in Stockholm. In addition, the SCA based its conclusion on the geographic market on data on the distances buyers travelled to buy a new or used car.<sup>14</sup>

19. Southern Sweden is close to Denmark where prices for several models of new cars were lower than in Sweden.<sup>15</sup> Despite the price difference, import of cars by private persons was limited. In 2002, such import amounted to about five per cent of the sale of new cars in Sweden and about seven per cent of the sale of new cars in most southern parts of Sweden. For used cars, the corresponding share was around two per cent. The reasons for the limited imports included higher administrative costs for the registration of an imported car, time consuming paper work, costs for adjustments to fulfil insurance companies' criteria and the difficulty to make a complaint. In addition, cars made for sale in another EU member state did not always have all the equipment that is standard in cars made for the Swedish market.

20. The defendants argued that the geographic market was wider than the SCA had concluded. In particular they argued that for used cars the internet was an important source of information for customers and a marketing channel for the dealers, and that the geographic market was potentially national, comprising the whole of Sweden. However, the SCA's investigation had shown that the car dealers' physical outlets were, at the time of the infringement (1998-2002), a more important marketing channel than the internet. This was in particular the case for used cars. Even in 2005 (three years after the infringement, when the importance of internet had presumably grown), the majority (61%) of the customers found the used car they finally purchased after visits to the car dealer's outlet. Not more than 25% found their used car through advertising on the internet. In its judgment, the court sided with the SCA, but noted that there were indications that the geographic market for used cars, thanks to internet sales, might have been somewhat wider, although not national. The court did not come to a conclusion on the precise definition of the geographic market as it did not find it necessary to find an appreciable constraint of competition.<sup>16</sup>

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<sup>14</sup> As regards the distance buyers were willing to travel, the results of the investigation showed that buyers of used cars travelled a longer distance than buyers of new cars. Presumably, this could be explained by the fact that travelling longer will not increase the selection of new cars since all dealers are able to offer the same models. In contrast, buyers of used cars will likely find more options if they are willing to travel a longer distance.

<sup>15</sup> For example, the price for a new Volvo S60 was more than ten per cent higher in Sweden than in Denmark, excluding taxes. Danish taxes were higher than in Sweden, but a Swedish buyer who imported a car from Denmark paid Swedish tax.

<sup>16</sup> See judgment of the Market Court of 10 September 2008, in case MD 2008:12 – *Konkurrensverket v Aktiebolaget Bil-Bengtsson and others*.

21. This case is from the infancy of internet and e-commerce, and market conditions may have changed since then. However, it shows that while the internet facilitates searches and price comparisons and may lead to a wider geographic market, there can be a limit to how far away consumers are willing to go look for alternative suppliers. This may in turn put a limit to how far the geographic market can expand, even with e-commerce.

### **3.4 *Perfume and cosmetics***

22. In 2009, the Swedish department store Åhléns wanted to acquire the retailer Department & Stores.<sup>17</sup> The parties' businesses overlapped in several retail segments, and the SCA had concerns that the merger would lead to significant impediment of effective competition in the market for premium perfume and cosmetics.

23. A key issue in the case was whether the relevant product market comprised all retail sales regardless of the distribution channels. The results of the SCA's investigation indicated that even if perfume and cosmetics were sold online, the selection of products online were typically more limited than in physical retail outlets. Other disadvantages of online sales that the SCA identified were the lack of possibilities to test the product, inferior customer service and a sense that returns and refunds were more complicated.

24. Another important distribution channel for perfume and cosmetics is the "travel retail" channel, i.e. sales in airports, airplanes and on ferries. If travel retail were to be included in the same relevant product market as sales in traditional shops and department stores, it could have resulted in a wider geographic market. The results of the SCA's investigation indicated that travel retail was to some extent seen as an alternative by the customers. However, considering, among other things, that most consumers travel rather infrequently and that seasonal variations in sales showed quite different patterns in travel retail compared to other channels, the SCA found that travel retail should not be included in the same relevant product market as sales in traditional shops and department stores.

25. With the relevant product market comprising only brick-and-mortar shops, the SCA found the relevant geographic market to be local. The SCA issued a summons application to the Stockholm District Court requesting the transaction to be prohibited. The parties subsequently abandoned the merger.

### **3.5 *Books***

26. Similar to the perfume and cosmetics merger described above, in a case concerning a merger between two bookstore chains the SCA investigated whether a distinction should be made between distant selling and other forms of retail.<sup>18</sup> The merging parties were active in the retail of books, both through brick-and-mortar shops and through online sales. As regards sales through brick-and-mortar shops, the results of the SCA's market investigation clearly indicated that the relevant geographic market was local. For example, the area served by a bookshop was rarely larger than the municipality where it was located and often significantly smaller than that. This view was supported by a customer survey conducted by the SCA and also by competing bookshops responding to the market investigation.

27. Due to the relatively ease with which books can be shipped, on-line retailers can serve a much wider area than physical outlets. Therefore, the definition of the relevant geographic market would likely depend on the definition of the relevant product market, i.e. whether sales through physical outlets and sale over the internet formed part of the same relevant product market.

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<sup>17</sup> The SCA's decision of 1 October 2009 in case 524/2009 – *Åhléns/Department & Stores*.

<sup>18</sup> The SCA's decision of 10 December 2012 in case 452/2012 – *Akademibokhandeln/Bokia*.

28. Several respondents to the SCA's market investigation took the view that brick-and-mortar shops were constrained by competition from online sales. However, the SCA noted that shopping in brick-and-mortar shops could offer advantages over online shopping, such as a higher degree of customer service and instant delivery. The SCA therefore conducted two customer surveys in order to assess customer purchasing patterns and diversion ratios. In addition, the notifying parties submitted the results of a customer survey that they had conducted. Although the results of these customer surveys differed in some aspects, they indicated that the substitutability between brick-and-mortar shops and online sales was too limited to justify a single relevant product market comprising both types of sales – despite the fact that books is one of the more popular product categories for online shoppers. In any event, the SCA noted the presence of online bookshops in its competitive assessment.

29. The SCA ultimately left the definition of the relevant product and geographic market open as it was not necessary for the assessment of the case. As noted above, e-commerce continues to develop fast and it cannot be excluded that in future cases online sales may be included in the same market as in bookshops with physical outlets. Whether this would also lead to a geographic market for books that is wider than national remains to be seen, considering, for example, language preferences.

### 3.6 *Package bus tours*

30. In this case, the internet did not play an important role in the definition of the geographic market. The case is nevertheless included in this note to illustrate that geographic markets may expand across borders, while still not encompassing the whole countries. The case concerned a cartel between two bus tour operators.<sup>19</sup> The SCA considered that the relevant product market was package bus tours to European destinations.

31. Marketing of the package bus tours was done in both Sweden and Norway, through printed catalogues, in various media and on the internet. However, even if the services were marketed in media with nationwide coverage in the two countries, the SCA's investigation showed that the vast majority of the tour operators' customers lived within the area of the network of connecting buses, indicating that competition took place in this area.

32. The result of the investigation further showed that only a small share of Swedish customers bought package bus tours from foreign operators, due to preferences to have a Swedish speaking guide and to travel with a culturally homogeneous group of travellers. Norwegian customers, however, did to some extent travel with Swedish tour operators, which could be explained by the competitive prices offered by Swedish operators.<sup>20</sup> For the purposes of the case, the SCA considered that the relevant geographic market comprised the south and middle of Sweden and south east Norway. The geographic market corresponded to the tour operators' network of connecting buses.

33. The Parties did not agree with the SCA's market definition and argued that package holidays by air should also be included in the relevant product market, and that the relevant geographic market should include the whole of both Sweden and Norway.

34. The Stockholm District Court did not find it necessary to reach a conclusion on the precise definition of the relevant market to find an infringement of the competition rules.

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<sup>19</sup> See Stockholm District Court's judgment of 24 February 2012 in case T 19974-10 – *Konkurrensverket v Scandorama and Ölvemarks*.

<sup>20</sup> Another possible explanation as to why Swedes may prefer package bus tours from Swedish tour operators over Norwegian operators, is the fact for destinations in continental Europe travelling with a Norwegian operator, this can mean a detour for a Swedish traveller.

#### 4. Conclusion

35. E-commerce has the potential to lead to increased cross-border sales and this could in turn warrant competition authorities defining relevant geographic markets that are wider than national. However, a wider geographic market does not follow automatically from the prevalence of online retailers of a certain product or service.

36. The purpose of market definition is to identify the actual competitors that are able to constrain a dominant player or a merged entity. Therefore, market definition should be based on facts, and competition authorities need to continue to define the relevant markets on a case by case basis, and find out what alternative suppliers customers can realistically turn to.

37. The question of whether the relevant product market is defined as an overall market comprising both sales through brick-and-mortar shops and distant selling, most notably via the internet, can have a significant impact on the scope of the relevant geographic market. As the cases described in this note show, consumers have seen purchases via the internet as a substitute to purchases in a physical retail outlet for some type of products, but not for others. For products that consumers want to see in real life and try out before a purchase, e.g. cars or perfumes, the growth of online retail has not led the SCA to define wider geographic markets, or has only expanded the geographic market to a limited extent. For more standardised products, e.g. computer components, online sales will more likely be seen by customers as an alternatives to physical outlets.

38. Even when consumers see online retailers as alternatives to brick-and-mortar shops and a wider geographic market should be defined, this does not necessarily mean that the geographic market is wider than national. In its e-commerce sector inquiry, the European Commission has identified several obstacles to cross-border trade. On the side of the customers the reasons for not purchasing online from retailers in other EU member states include concerns regarding delivery and return possibilities. This was a reason identified by the SCA in cases regarding computer components and cars. In addition, although not related to e-commerce as such, strong consumer preferences for domestic or even locally produced products may also explain the lack of cross-border trade.<sup>21</sup>

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<sup>21</sup> The SCA has identified strong preferences for domestic/local products in particular in cases in the food sector, e.g. dairy products and poultry.